

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

Best Care Home Health, Inc.,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

This matter came before the Honorable Thomas W. Wexler on November 26, 2012, for an evidentiary hearing. Respondent was permitted to submit additional proposed exhibits that were discussed at the hearing, and Petitioner was provided time to respond or request additional hearing. Respondent submitted additional exhibits, Petitioner requested additional hearing, and the additional exhibits were marked and received at a hearing on January 22, 2013.

At that hearing Respondent was requested to submit still additional written information relating to the number of employees needing foreign language assistance. That kind of information was submitted on or about February 12, 2013. Petitioner stipulated to the admission of that documentation, which has now been marked as Exhibit "S." Petitioner declined an additional hearing about the new exhibit and declined additional oral argument. Respondent has also declined oral argument. Thus the record was closed on February 21, 2013.

Petitioner is the Department of Labor and Industry, Minnesota Occupational Health and Safety Division (MNOSHA). Respondent is Best Care Home Health, Inc. (Best Care). MNOSHA was represented by Rory Foley, Assistant Attorney General. Best Care was represented by Nazneen Khatoon, one of its three owners, who is not an attorney.

STATEMENT OF THE ISSUES

Did respondent, Best Care, fail to comply with specific occupational safety and health regulations promulgated under Minn. Stat. § 182.65, *et seq.*?

Upon the evidence and arguments of the parties the Administrative Law Judge makes the following findings, conclusions and order.

FINDINGS OF FACT

1. Best Care is a corporation that provides care services in clients' homes. Those direct care personnel include Personal Care Attendants (PCAs), Home Health Aides (HHAs), Licensed Practical Nurses (LPNs), and Registered Nurses (RNs).

2. The Best Care office is located at 3008 University Avenue S.E., Minneapolis, Minnesota, and that is where the company performs much of its training and maintains its records.¹ In March 2011, Best care employed approximately 120 persons who provided direct client care.²

3. Best Care has been in business for over 18 years. It is a Medicare and Medicaid Certified Home Health Care agency and it is licensed by Minnesota for Class "A" and class "F" licenses.³ The company is subject to regulations and inspections by a few different government agencies; including the Minnesota Department of Health and Human Services, the Minnesota Department of Labor and Industry, and the agencies responsible for administering the Medicare and Medicaid programs.⁴

4. On February 15, 2011, MNOSHA sent a written notice to Best Care stating that MNOSHA received allegations of hazards at the Best Care worksite.⁵ The specific alleged hazards were as follows:

- (a) Employees are not trained for dealing with infectious agents.
- (b) The employer does not have procedures for dealing with infectious agents.
- (c) Employees are not provided adequate personal protective equipment.

5. On February 24, 2011, Best Care responded to the notice in significant detail, denying the allegations.⁶ Briefly, the denial noted that Best Care is a Medicare Certified and Class A licensed agency in Minnesota. Per Medicare regulations Best Care is required to provide regular in-service training on infection control to all direct care employees, and training must be completed on an annual basis. Both Medicare and the Minnesota Department of Health monitor compliance with these requirements. The letter goes on to provide details of the training about infectious agents, identifies the written materials that are provided about infectious agents, and identifies the personal

¹ Testimony of P. Donahue and N. Khatoon.

² Test. of P. Donohue.

³ Exhibit A.

⁴ Test. of N. Khatoon.

⁵ Ex. A, pp.33-34.

⁶ Ex. O.

protective equipment the employer provides.⁷ In March 2011, a MNOSHA inspector conducted inspections at Best Care in response to the complaint allegations. From March 8 to March 30, 2011, the inspector made five visits to Best Care. Most of the visits were unannounced. This was the only inspection the inspector had made of a home health care company, but he was familiar with OSHA rules relating to bloodborne pathogens.

6. In March 2011, a MNOSHA inspector conducted inspections at Best Care in response to the complaint allegations. From March 8 to March 30, 2011, the inspector made five visits to Best Care. Most of the visits were unannounced. This was the only inspection the inspector had made of a home health care company, but he was familiar with OSHA rules relating to bloodborne pathogens. The investigation was mostly limited to the complaint allegations, but it is common practice to also review the following: (1) existence of a “workplace accident and injury reduction program” (AWAIR), (2) general issues of safety and health, and (3) existence of a Right to Know program.

7. Following the inspections, and upon the recommendation of the inspector, MNOSHA issued approximately eight citations to Best Care. An informal conference was then held, following which three of the citations were withdrawn.⁸ Notice of the remaining citations and penalties was issued on April 15, 2011.⁹ Best Care disputed the citations and timely filed a Notice of Contest.¹⁰ The five citations and penalties remaining for this contested case hearing will be addressed below.

CITATION 1, ITEM 1. Minn. Stat. 182.653 subd. 8: A written Workplace Accident and Injury Reduction (AWAIR) Program that promotes safe and healthful working conditions and is based on clearly stated goals and objectives for meeting those goals was not established, specifically: The employer does not have a written AWAIR program.^{11, 12}

8. Best Care denies the substance of this allegation. Best Care admits that it did not specifically have a written section of its policies and procedures that it called an AWAIR program, but alleges that it had the essential equivalent in its policies and procedures manuals. Further it asserts that it was diligent in teaching relevant safety measures and monitoring events of injury.¹³ MNOSHA cites Minn. Stat. § 182.653, subd. 8, as the authority requiring an AWAIR program. That subdivision reads as follows:

Subd. 8. Work place programs or AWAIR.

⁷ Ex. O.

⁸ Test. of N. Khatoon.

⁹ Ex. 2.

¹⁰ Ex. 3.

¹¹ Ex. 2, p. 5.

¹² Note: Effective 2012, the home health care industry is no longer required to have an AWAIR program, because the industry code (621610) was removed from the list in Minn. R. 5208.1500.

¹³ Ex. A, including attachments 2, 5 and 7.

(a) An employer covered by this section must establish a written work place accident and injury reduction program that promotes safe and healthful working conditions and is based on clearly stated goals and objectives for meeting those goals. The program must describe:

(1) how managers, supervisors, and employees are responsible for implementing the program and how continued participation of management will be established, measured, and maintained;

(2) the methods used to identify, analyze, and control new or existing hazards, conditions, and operations;

(3) how the plan will be communicated to all affected employees so that they are informed of work-related hazards and controls;

(4) how work place accidents will be investigated and corrective action implemented; and

(5) how safe work practices and rules will be enforced.

(b) An employer must conduct and document a review of the work place accident and injury reduction program at least annually and document how procedures set forth in the program are met.

9. The statute does not specifically require that the written program be set forth in a **separate** publication. This would be a preferable method of compliance, but is not specifically stated.

10. MNOSHA publishes a "Field Compliance Manual".¹⁴ Page 83 of that manual specifies that a citation issued for lack of an AWAIR program will be classified as serious and an unadjusted penalty of \$1,000 will be proposed. It also provides that the proposed penalty will be adjusted for good faith, size and history and that any appropriate penalty multiplier will be applied. The minimum adjusted penalty is \$100. The Field manual does not specify any details about the contents of the program. Here MNOSHA imposed an adjusted penalty of \$500.00.

11. Best Care publishes a "Field Service Policy Handbook" (hereafter the Handbook) which substantially covers the AWAIR program requirements.¹⁵ Each subpart of the AWAIR program requirements is addressed below.

(a)(1). How managers, supervisors, and employees are responsible for implementing the program and how continued participation of management will be established, measured and maintained.

¹⁴ Ex. 2B.

¹⁵ Ex. A, attachment 2.

12. The Handbook requires:

- a. Management must assure that all employees have a Mantoux test before employment and every year thereafter. If the test is positive, the Handbook imposes other requirements that managers must assure are met. (Handbook page 1.)
- b. Management must assure that all employees attend the orientation session, (Handbook page 1), which is a full day session that extensively addresses bloodborne pathogen exposure safety, lifting techniques and other items described elsewhere in the findings herein. Other specifics of the orientation are detailed on page 2 of the Handbook which includes safety considerations for the employee as well as the client, including: obstacles, emergency numbers, location of fire extinguishers and smoke detectors, house tour, and equipment operation.
- c. Management is required to assure that all home health aides receive an orientation by an RN to each client they care for. (Handbook page 1.)
- d. The Administrator and the Director of Nursing are required to be available for questions regarding company policy. (Handbook page 2.)
- e. The Case Manager is required to be available to answer questions about client care. (Handbook page 2.)
- f. Management is required to offer 12 hours of in-service training each year, and to assure that each field worker attends. (Handbook page 2.)
- g. Management is required to offer bloodborne pathogen training on a yearly basis and to assure that each employee receives that annual training. (Handbook page 2.)
- h. Management is required to offer HHA training and competency testing for all applicants. (Handbook page 2.)
- i. Management is required to have an RN on call 24 hours per day every day. (Handbook page 3.)
- j. Employees are required to report injuries to the office immediately. (Handbook page 7.) They may be asked to fill out an incident report. (See also Handbook page 10.)

Management may require a doctor's release before permitting return to work.

- k. Employees are advised in writing about handwashing requirements and procedures.

(Handbook pages 7-8.)

- l. Management has a list of preferred medical providers if employees are injured on the job. (Handbook page 9). Employees are encouraged, but not required to use these services. The addresses, phones and fax numbers of the services are included.
- m. Management is required to offer Hepatitis B vaccination to all employees exposed to blood borne pathogens. (Handbook pages 9-10.)
- n. If a client reports that an employee is using alcohol, drugs or other intoxicants the Administrator or Director of Nursing is required to investigate the claim immediately and to take appropriate action. (Handbook page 10.)
- o. Management is required to promptly investigate allegations of sexual harassment and determine an appropriate response. (Handbook page 11.)
- p. Management is required to supervise home health aides on some cases every 14 days but at least every 60 days. (Handbook page 2.)

13. Best Care also has a Policy and Procedures Manual for "Home Care Operational Guidelines" that is published by Briggs Corporation.¹⁶ This manual is recognized authority in the home health care industry. The OSHA inspector appropriately states that the manual is generic, but much of the workplace safety procedures in this type of industry are clearly common medical practices developed in the medical industry to address familiar workplace exposures. The inspector does not take issue with the appropriateness of the practices and procedures specified in the manual.¹⁷ Best Care considers the manual to be an authoritative guideline for appropriate procedures to address workplace safety.¹⁸

(a)(2). The methods used to identify, analyze, and control new or existing hazards, conditions, and operations.

¹⁶ Exs. P1, P2, and P3.

¹⁷ Test. of P. Donohue.

¹⁸ Test. of C. Vosper.

14. There is no evidence that this industry is subject to “new” hazards. The existing hazards are well known and there have been no new OSHA-mandated safety requirements applicable to this industry for some time; at least for the past three years since the Best Care Director of Nursing began serving on the Regulations Committee of the Minnesota Home Care Association.¹⁹ The *known* workplace hazards that were identified at this hearing were exposure to infectious diseases and lifting of clients.²⁰

15. The Handbook describes methods that will be used to control existing hazards:

- Employees are required to attend an orientation session.
- All HHAs will receive an orientation by an RN with each new client they care for. This will usually be done in the client’s home and will include safety matters such as location of fire extinguishers and smoke detectors, a house tour and operation of a hoier lift.
- Twelve hours of in-service training are required each year.
- Bloodborne pathogen training is required yearly.
- Employees will be supervised in some cases every 14 days and at a minimum every 60 days.
- Injuries to the employee must be reported to the office immediately and an incident report may be requested.
- Handwashing and medical asepsis are addressed.
- Offer of Hepatitis B vaccine is addressed.
- An injury reports policy is set forth.
- It is stated that the Administrator and Director of Nursing are available for questions.²¹

16. Thus the “methods” to control hazards are set out in the Handbook, the orientation training, the other training, and the materials provided in that training which address the details of safe practices.²²

(a)(3). How the plan will be communicated to all affected employees so that they are informed of work-related hazards and controls.

17. All employees are provided a copy of the Handbook. They are advised to keep it and refer to it as needed.²³

¹⁹ Test. of C. Vosper.

²⁰ Ex. A, attachment 1, identifying bloodborne pathogen precautions, body mechanics, and Hoyer lift.

²¹ Ex. A, attachment 2.

²² Exs. B, C, H, I, J, K and Ex. A attachments 5, 6, 7, and test. C. Vosper.

²³ Ex. A, attachment 2, p. 1.

18. The Handbook describes the training procedures that will be used to inform employees of the work-related hazards and the related safety measures, as noted above.

(a)(4). How work place accidents will be investigated and corrective action implemented.

19. Employees are required to immediately contact Best Care to file an accident report.²⁴

20. There is no mention *in the Handbook* of how an accident will be investigated, however, the Briggs Corporation manual addresses how *the employer* should respond to certain incidents/accidents, as follows:²⁵

- a. Page D-255 addresses how the employer should follow up on a bloodborne pathogen exposure.²⁶
- b. Page D-440 refers the employer to the infection control manual for exposures to Aids or Hepatitis B.²⁷
- c. Page B-340 establishes procedures for work incidents that require treatment, lost work days, hospitalization or that identify new safety hazards previously unrecognized. Incident reports are to be reviewed by the appropriate supervisors and a determination of whether further action is needed is to be made. Then the leadership is to determine opportunities for performance improvement or continued monitoring. There are other specific recommendations for incidents of exposure to infectious processes.²⁸

(a)(5). How safe work practices will be enforced.

- a. The employee will be supervised at stated intervals of no more than 60 days and possibly as often as every 14 days.²⁹
- b. Accidents and the details thereof, including medical treatment, must be reported immediately.³⁰

²⁴ Ex. A, attachment 2, p. 10.

²⁵ Ex. P.1-3.

²⁶ Ex. P.3.

²⁷ Ex. P.3.

²⁸ Ex. P.1.

²⁹ Ex. A, attachment 2, p. 2.

³⁰ Ex. A, attachment 2, p.10.

- c. The use of illegal drugs or intoxicants will result in disciplinary action up to termination.³¹
- d. Substandard work performance, that the employee has shown an inability to correct, will be reason for dismissal.³²
- e. Training and competency testing is offered for all HHA staff and applicants.³³
- f. All employees must be registered or licensed to practice in Minnesota.³⁴

21. There was no notice to Best Care that they were required to have an AWAIR program. Apparently neither the Department of Health nor OSHA provided such notice. Best Care belongs to a professional organization of home health care agencies and has a representative on the agency board and none of the representatives present at a recent meeting had ever heard of an AWAIR requirement.³⁵

22. The businesses that are required by state law to have an AWAIR program are identified in Minnesota Administrative Rule 5208.1500. This rule substantially repeats the “North American Industry Classification System” (NAICS) list, which is apparently generated in conjunction with the United States Office of Management and Budget.³⁶ The industry code number for the home health care business is 621610. That code number was added to the NAICS list in the 2002 edition. *However, that code number was removed from the Minnesota rule effective in 2012. Industry codes are added or removed from the list from time to time depending upon their accident experience.*³⁷ *Thus Best Care is no longer required to have an AWAIR program.* Nonetheless, in 2011, when this inspection was conducted, the AWAIR requirement applied.

23. The home health care business community was generally unaware of the AWAIR requirement.³⁸ However, the community was fully aware of the safety concerns that an AWAIR program should address, and there were well-recognized safety procedures in common use in the industry to address those safety concerns.³⁹ Best Care was observing all of those concerns and was using training and educational materials published by recognized authorities, including OSHA, to educate and train its employees.

³¹ Ex. A, attachment 2, p.10.

³² Ex. A, attachment 2, pp. 9-10.

³³ Ex. A, attachment 2, p. 9.

³⁴ Ex. A, attachment 2, p.1.

³⁵ Test. of N. Khatoon.

³⁶ Rule 5208.1500.

³⁷ Test. of. P. Donahue.

³⁸ Test. of N. Khatoon.

³⁹ Test. of C. Vosper.

24. The only safety concern that was clearly identified in the hearing, other than exposure to infectious agents, was lifting and transfer procedures, and those were also covered in the Best Care training classes. Otherwise, since the Best Care employees each work at a separate worksite, the Handbook provides that an orientation by an RN will be provided at the client's home or by telephone to all home health aides.⁴⁰

25. Best Care's "Field Staff Policy Handbook" substantially met the requirements of Minn. Stat. § 182.653 subd. 8, when considered in conjunction with employer procedures set forth in the industry-recognized Briggs Corporation manual.

CITATION 1, ITEM 2. 29 CFR 1910.1030(f)(2)(i): Hepatitis B vaccination was not made available after the employee had received the training required in 29 CFR 1910.1030 (g)(2)(vii)(I) or within 10 working days of initial assignment to employees who had occupational exposure to blood or other potentially infectious materials. The employer did not make available the hepatitis B vaccine and vaccination series to all employees who had exposure to blood borne pathogens.⁴¹

26. The inspector was under the impression that the Hepatitis B vaccine was not offered to all Best Care direct care employees.⁴² However, there is convincing evidence that all direct care employees were informed of the availability of the Hepatitis B vaccine prior to their initial assignment and at least annually thereafter. It is further clear that the employer would pay for the vaccine. There also was training addressing the potential for exposure, and that if the employee initially declined the vaccine that the employee could later change his/her mind and elect to have it.⁴³ The MNOSHA inspector testified that two unidentified Best Care employees stated that they were not offered the Hepatitis B vaccine.⁴⁴ However, the better evidence is that the vaccine was offered to all direct care employees.⁴⁵ Best Care clearly devoted substantial written, oral and video attention to educate staff about the risk of infectious diseases and bloodborne pathogens, the care procedures, and the availability of vaccine at employer expense to protect against them.⁴⁶ The orientation agenda indicates that the training on bloodborne pathogens was approximately 40 minutes of the training session.⁴⁷

27. In March 2011, Best Care was not having its employees sign a form when the employee *declined* the vaccination. However, in April 2011, before the abatement date specified in the notification, Best Care redesigned its form to include a specific

⁴⁰ Ex. A, attachment 2, p. 1.

⁴¹ Ex. 2, p. 6.

⁴² Test. of P. Donahue.

⁴³ Exs. B, I and N.

⁴⁴ Test. of P. Donahue. Because they were not identified, Best Care could not check the employee training records.

⁴⁵ Test. of C. Vosper, N. Khatoon, and Ex. 4, attachment #2 (Field Staff Policy Handbook at pp. 9-10) and attachment #5, Exs. B, C, H (page 9), I, J, and K.

⁴⁶ Exs. A (attachment 2), B, C, and H.

⁴⁷ Ex. A, p. 7-7.

option to decline.⁴⁸ Nonetheless, the employees were educated, about the risks of disease and the availability of vaccination, by classroom training, by video, and by written material.

28. The written materials provided to the employees included citations to contacts at the Centers for Disease Control (phone numbers and websites), a reference to vaccine information at 42 United States Code 300aa-26, to OSHA rules, to the Vaccine Adverse Event Reporting System (phone and website), to the National Vaccine Injury Compensation Program (phone and website), and to the local or state health department. These written materials appear to have been prepared by government agencies or other professional entities and appear to be reasonably comprehensive.⁴⁹ Most all of the subparts of 29 CFR 1910.1030 (g)(2)(vii)(g) are addressed in the written materials. The MNOSHA investigator agrees that the written handouts addressing bloodborne pathogens met the majority of the requirements. He did not specify what requirements were not met.⁵⁰

29. Best Care offered the Hepatitis B vaccine to all of its direct care employees at employer expense.

CITATION 1, ITEM 3. 29 CFR 1910.1030 (g)(2)(i). The employer did not ensure that employees with occupational exposure participated in a training program. Annual training was not provided for employees with occupational exposure to bloodborne pathogens.⁵¹

30. There is convincing evidence that initial training was provided at the time of hiring and that annual training was also provided. The training included means of transmission, aseptic practice and standard protocols, handwashing procedures, personal protective equipment, symptoms of disease, treatment and hazard contamination measures.⁵² The initial orientation training was provided by classroom PowerPoint presentation,⁵³ and by an OSHA-produced video.⁵⁴ The inspector viewed the videos and written handouts and agrees that they met the majority of the substantive bloodborne pathogen training requirements.⁵⁵

31. Best Care employs various kinds of administrative and medical personnel including a general administrator, a Human Resources Coordinator, a Director of Nursing who is a registered nurse, and a Medical Director who is a medical doctor. The current Best Care Director of Nursing serves on the Regulations Committee of the

⁴⁸ Test. of N. Khatoon.

⁴⁹ Exs. B, C, and I and K and OSHA video (Ex. N).

⁵⁰ Test. of P. Donohue.

⁵¹ Ex. 2, p. 7.

⁵² Exs. A (attachments 1, 2, 2A and 7), D, E, F, G, and H.

⁵³ Ex. H.

⁵⁴ Ex. N and test. C. Vosper.

⁵⁵ Test. of P. Donohue.

Minnesota Home Care Association. She has served on that committee for approximately three years.⁵⁶

32. Approximately weekly, as new employees are hired, Best Care conducts a new employee orientation class. The class is a full day, from 9:00 a.m. to 4:00 p.m., and usually has approximately five trainees. If the training is for a person whose English skills are insufficient, then an interpreter is required to be present and the orientation training is one-on-one. The orientation includes classroom lectures and video presentations. The classroom live presentations are made by the Human Resources Coordinator about administrative matters and by the Director of Nursing about medical issues and care procedures. Sometimes a registered nurse, other than the Director of Nursing, covers the medical and client care part of the orientation. The trainees are paid to attend the class. The orientation also includes two video presentations. One of the video presentations, addressing infectious agents, was produced by OSHA and was purchased by Best Care from the OSHA website. The second video is a home care video. All new employees are required to attend the training.⁵⁷ Each employee, including nurses, HHAs, PCAs and homemakers, is required to sign an employment contract stating that they received training including “infection control/OSHA requirements.”⁵⁸

33. The inspector agrees that the initial training appears to be acceptable.⁵⁹ The inspector testified that he did not see anything in the annual take home material and test packet regarding bloodborne exposure control.⁶⁰ However, at the evidentiary hearing Best Care produced a pamphlet entitled “Bloodborne Pathogens and Standard Precautions”—a learning guide, and a test sheet that accompanied that material.⁶¹ This was at least one of the kinds of educational and testing materials that Best Care regularly used for annual training.⁶²

34. The clinical practice part of the orientation, by a registered nurse, addresses safety requirements such as handwashing procedure, all OSHA requirements, availability of Hepatitis B vaccine (including information about risk of Hepatitis B exposure; which is also covered in the video), bathing, dressing, grooming procedures, wound care, medication procedures and limitations, vulnerable adults, nutritional status, toileting, annual training procedures, emergency procedures and management, and more.⁶³ The orientation training includes discussion of personal protective equipment and that the equipment is available in the company office.⁶⁴ The MNOSHA inspector saw the inventory of the equipment during his inspection and thought that it looked appropriate.⁶⁵ A registered nurse is on duty around the clock

⁵⁶ Test. of C. Vosper.

⁵⁷ Test. of C. Vosper and N. Khatoon.

⁵⁸ Ex. A, p. 23.

⁵⁹ Test. of P. Donohue.

⁶⁰ Test. of P. Donohue.

⁶¹ Ex. K.

⁶² Test. of C. Vosper.

⁶³ Ex. A, p. 7.

⁶⁴ Ex. H.

⁶⁵ Test. of P. Donohue.

every day to answer questions of the direct care staff. During the regular workday the Administrative Director and the Director of Nursing are also available to answer staff questions.

35. Annual training was provided to HHA and PCA staff by written materials to be read and a test to be answered.⁶⁶ MNOSHA asserts that the annual update materials were not taught on site during working hours. However, Best Care instructed its employees to submit the time spent reading the materials and completing the test on the time records for payment.⁶⁷ Best Care then kept records of the test submissions and placed the submitted materials in the employee personnel files.⁶⁸ The employees were also instructed that they could call the nursing staff with any questions or concerns.⁶⁹

36. In addition to the Handbook, Best Care utilizes a number of other procedures to educate staff about bloodborne pathogens and infectious diseases:

- a. Employees are required to sign forms indicating that they have attended the orientation class, which includes subjects of employee safety such as infectious diseases, lifting, Emergency Procedures Plan and orientation to the Home Care Bill of Rights.⁷⁰
- b. Nursing staff are required to acknowledge on an attendance form that they have received training on approximately 35 itemized subjects, including infection control and orientation to home care.⁷¹
- c. Nursing staff are required to attend in-service training approximately monthly, and attendance records are kept. Some of these classes relate to items of safety, such as bloodborne pathogens, infection control and disease management.⁷²
- d. All nurses are required to acknowledge that they have completed 1.0 hours of annual training for bloodborne pathogens and infection control. This is accomplished by a power point presentation by the director of nursing and by watching a You Tube video put out by OSHA. Best Care maintains a log of completion of this annual training.⁷³
- e. PCA and HHA staff are required to complete annual training on bloodborne pathogens by take home material and a test.⁷⁴ Best

⁶⁶ Exhibit B and test. N. Khatoon.

⁶⁷ Test. of C. Vosper and N. Khatoon.

⁶⁸ Test. of C. Vosper.

⁶⁹ Test. of N. Khatoon.

⁷⁰ Ex. D.

⁷¹ Ex. E.

⁷² Exs. F and L.

⁷³ Exs. G and H.

⁷⁴ Ex. B.

Care maintains records to monitor completion of the materials review and test completion. If the annual training is not completed and verified, then the employee is suspended. Each employee's documentation is kept in their personnel file and test completion is also recorded in the company computer system. The employee charts are periodically audited by the Director and the Human Resources Coordinator to assure that the records are up to date. If an item is missing, the employee is contacted to complete that item.⁷⁵

- f. As noted above, Best Care also conducts a full day of orientation which includes instruction on body mechanics, bloodborne pathogens, handwashing, universal precautions, and transfers.⁷⁶

37. Best Care has adequately identified the hazards common to the employment. The written materials provide, in addition, for employee orientation to each new client, where, presumably, any special safety concerns would be addressed. The written policies require managerial staff to conduct the orientation training as well as the subsequent monthly and annual training, which includes employee safety.⁷⁷

38. Best Care met the pre-employment and annual training requirements.

CITATION 1, ITEM 4. 29 CFR1910.1030 (g)(2)(vi): Material appropriate in content or vocabulary to educational level, literacy, or language of employees was not used in the bloodborne pathogen training program. Employer did not provide training in a manner that could be understood by employees who speak languages other than English.⁷⁸

39. Best Care provided periodic training classes for non-English speaking employees, by either providing an interpreter or requesting the employees to bring an interpreter to the training classes.⁷⁹ Commonly these employees are working for family members and bring a family member with skills in both languages to assist.⁸⁰

40. Best Care has limited foreign language orientation documents for employees.⁸¹ These materials consist of two pages in each of Somali, Spanish, and Hmong, and four pages in Vietnamese.

41. Exhibit S is a list of Best Care's current direct care employees. There are 182 employees on the list. The request for this information was to produce the list as of March 2011, when the inspection was conducted. However, it was recognized that might be a difficult retroactive effort. Thus the current list will have to suffice for the

⁷⁵ Test. of C. Vosper.

⁷⁶ Ex. A, p. 7.

⁷⁷ Ex. A, attachment 2, pp. 1-2.

⁷⁸ Ex. 2, p.8.

⁷⁹ Test. of N. Khatoon and C. Vosper.

⁸⁰ Test. of C. Vosper.

⁸¹ Ex. Q.

purpose of addressing the reasonableness of Best Care's efforts to accommodate employees who require interpretation. Exhibit S shows that of the 182 employees, interpretation is required for seven employees as follows:

4 in Spanish

1 in Hindi

1 in Korean

1 in Urdu (needs a little help).

Thus 3.8 percent require interpretation. If the Urdu speaker is excluded from the calculation then the percent is 3.3 percent.

42. The inspector appropriately argues that without more extensive interpreted training materials, it is difficult to know how much the employee is learning.⁸² But that is an issue in any language, even for native speakers. Providing interpreters is a common method of addressing communication with non-native language speakers. Best Care further enhances the training process by scheduling these training sessions one-on-one. There is no evidence that Best Care has experienced any on the job problems due to misunderstanding of training instructions by employees lacking English skills. Best Care has never had a case of bloodborne pathogen contraction.⁸³

43. Best Care has reasonably vindicated the requirement that training be provided in a manner that could be understood by employees who speak languages other than English.

CITATION 2, ITEM 1. 29CFR1910.1030 (h)(2)(ii): Employee training records for bloodborne pathogens were not maintained for 3 years from the date on which training occurred: Training records were not maintained for employees in the job classes of RN or LPN.⁸⁴

44. There is convincing evidence that Best Care maintained these records for nursing personnel.⁸⁵ At the March 14, 2011, visit the inspector requested training records for two nurse employees, but the records were not then available. The records were related to an investigation by a law enforcement agency and had been taken by that agency.⁸⁶ Those records have now been returned or copied, and no charges were brought as a result of that other investigation.⁸⁷

⁸² Test. of P. Donohue.

⁸³ Test. of N. Khatoon.

⁸⁴ Ex. 2, p. 9.

⁸⁵ Exs. D, E, F, G and L.

⁸⁶ Test. of N. Khatoon and C. Vosper.

⁸⁷ Test. of N. Khatoon.

45. Best Care produced examples of in-service training records maintained for nursing employees.⁸⁸

46. The MNOSHA inspector felt that the written materials that he saw, did not address important factors such as the following:⁸⁹

A. What job positions have exposure: However, all direct care employees were noted to have exposure.⁹⁰ Principally the exposure would be to nursing personnel.⁹¹

B. What procedures are to be followed when an exposure incident occurs: This is addressed at a few different places.⁹²

C. Vaccination status of employees: There was no evidence as to whether this was recorded in the employee personnel records. However, the Handbook requires all employees to have a Mantoux test before employment and every year thereafter.⁹³ Thus it is likely this information is in the employee files.

D. What safeguards are in place, such as personal protective measures: All direct care employees were provided with Exhibit K which addresses personal protective measures such as handwashing, use of gloves, masks, etc., disposal of sharp items, disposal of soiled linens, and cleaning of contaminated surfaces.⁹⁴ Exhibit K also emphasizes what to do if an exposure occurs, and advises about the availability of Hepatitis B vaccine.⁹⁵

CONCLUSIONS OF LAW

1. The Administrative Law Judge is authorized to review the citations and penalties assessed by the Minnesota Department of Labor and Industry pursuant to Minn. Stat. § 182.661.

2. Respondent received proper notice of the citations and penalties and of its right to appeal them. Respondent properly appealed and received notice of the time and place of the hearing.

3. Petitioner has complied with all relevant substantive and procedural requirements.

⁸⁸ C.F. Exs. E, F, G, and L.

⁸⁹ Test. of P. Donohue.

⁹⁰ Ex. 6, B-405.

⁹¹ Test. of C. Vosper.

⁹² Ex. A, attachment 2, p.17; Ex. K, and Ex. P3, p. D-255.

⁹³ Ex. A, attachment 2, p. 1.

⁹⁴ Test. of C. Vosper.

⁹⁵ Ex. K.

4. The citation and penalties assessed for Citation 1 and Citation 2 are not proven and those Citations should be dismissed and the penalties should be vacated.

Based upon the foregoing findings of fact and conclusions of law, the Administrative Law Judge makes the following order:

ORDER

IT IS HEREBY ORDERED that the citations and penalties imposed by Petitioner against Respondent are vacated and dismissed.

Dated: March 4, 2013

s/Thomas W. Wexler

THOMAS W. WEXLER
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

One of the recurring themes of this case is the belated production of documents by Best Care. Some of that was likely due to unfamiliarity with AWAIR program requirements, but otherwise Best Care was familiar with inspection procedures in general, and should have been able to produce more documentation at an earlier date. Then, during the hearing herein, there was a continuing pattern of belated disclosure of documents that would prove a point. Best Care was not likely being obstructive, but Best Care was not represented by an attorney, which might have facilitated more organized presentation of evidence. It appears that Best Care came to the hearing expecting that its oral testimony would suffice, when, in reality, document production would have been preferred. Of course, the failure to produce documents also made the inspector's work more difficult. In any event, documents have now been produced that reasonably vindicate Best Care's objections. There could still be more documentation relating to some issues, but there has to be an end to litigation.

There appear to have been communication problems between the OSHA inspector and Respondent, particularly as they related to an AWAIR program. Respondent had never heard of such a requirement, and apparently other home care agencies were also unfamiliar with it. No state agency informed these businesses of the need for an AWAIR program. These businesses were otherwise commonly addressing the well-known safety components of their industry pursuant to long established procedures in the medical and care industries.

Minn. Stat. § 182.653, subd. 3, requires employers such as Best Care to comply with OSHA standards adopted in Minnesota. Minn. R. 5205.0010, subps. 1 and 2, incorporate 29 CFR 1910 into the Minnesota Rules. Minn. R. 5206 addresses infectious agents, including bloodborne pathogens. Rule 5206.0600, subp. 1a, states that compliance with 29 CFR 1910.1030 constitutes compliance with the Minnesota Rules in Chapter 5206.

Effective sometime in 2012, Minnesota removed the home health care service industry (NAICS business category #621610), from the list of businesses required to have an AWAIR program. Thus, Respondent is no longer required to have such a program. Nonetheless, that requirement existed in March 2011, when the inspection herein was made.

T. W. W.